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No. 93-835 and No. 93-836

FILED
DEC 23 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MIKE MOORE, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, *et al.*,

Appellants,

vs.

JOHNNY DUPREE, *et al.*,

Appellees.

On Appeal From
The United States District Court
For The Southern District of Mississippi

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

Whether the Appellants' motion filed pursuant to Fed. R. Civ. P. 59 suspended the finality of the District Court's order and rendered ineffective the notice of appeal filed prior to a decision on the Rule 59 motion?

Whether the District Court properly applied Clark vs. Roemer, 500 U.S. ___, 114 L. Ed. 691 (1991), in holding that the Attorney General did not preclear under § 5 of the Voting Rights Act a voting change that was not specifically identified in the State's submission of other related voting changes?

PARTIES TO THE PROCEEDING BELOW

The parties in the court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos. The current members of the school board of the Hattiesburg Public School District are Ralph Noonkester, Marci McMahan, Daisy Thorne, Sam Buchanan and Warren Hood.

Defendants: Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi.

Defendants/Intervenors: Lamar County School District and its Board of Trustees. The members of the Lamar County Board are: Charles L. Cameron, James Sider, Tommy Graham, Freddie D. Howell and Fred Boudreaux.

Defendants/Intervenors: Forrest County School District and its Board of Trustees. The members of the Forrest County Board are: Terry Ryals, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson.

Amicus Curiae: The United States participated as amicus curiae.

The Plaintiffs in the court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors.

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No. 93-835
No. 93-836

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MIKE MOORE, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

Appellants,

vs.

JOHNNY DUPREE, et al.,

Appellees.

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6, the Appellees move to dismiss this appeal from the District Court on the basis that the Appellants served a timely motion pursuant to Fed. R. Civ. P. 59(a) and (e) and then filed their notice of appeal before the

District Court decided the Rule 59 motion. In the alternative, the Appellees move the Court to affirm the opinion and order of the District Court because the question is so insubstantial as not to need further argument.

STATEMENT OF THE FACTS

Since 1926, Mississippi law has required that the boundaries of a municipal school district be, at a minimum, coterminous with its parent municipality. Thus, the residents of the city were always residents of the city school district. These residents elect the city council, which in turn appoints the members of school board for the city school district. The State of Mississippi attempted to change this policy in 1986 by repealing Miss. Code Ann. § 37-7-611, which provides that when a city annexes territory, the boundaries of the city school district automatically expand to encompass the territory annexed by its parent city.[1]

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[1] In 1977 and 1978, the State of Mississippi attempted to create an exception to § 37-7-611 by amending Miss. Code Ann. § 21-1-59. These amendments provided that the extension by annexation of a municipality's boundaries across a county line would not affect the boundaries of the adjacent county school district unless that school district consented to allow the annexed area to be included in the municipal school district. J.S. App. 3a-4a.

In 1991, the District Court granted summary judgment in favor of the Appellees on their claim that the 1977 and 1978 amendments to § 21-1-59 are not enforceable because they were never precleared by the Attorney General. Dupree vs. Mabus, 776 F. Supp. 290, 303-04 (S.D. Miss. 1991) (Dupree I), vacated and remanded on other grounds sub. nom, Dupree vs. Moore, 117 L.Ed. 2d 609 (1992). No Appellant

After the repeal of § 37-7-611, the residents of an area annexed by the city would not necessarily be residents of the city school district; they could remain residents of the county, or suburban, school district. This fundamental alteration of the long standing policy in Mississippi created the anomaly of the newly annexed residents continuing to elect directly the board members of their county, or suburban, school district, while indirectly selecting the board members of the city school district by participating in city council elections.

The repeal of § 37-7-611, as well as the amendments to § 21-1-59, limited the expansion of the Hattiesburg School District when its parent city expanded by annexation into neighboring Lamar County in 1979, 1981, 1985 and 1989 and into Forrest County, where the City of Hattiesburg is primarily located, in 1989. Because of these laws, the Hattiesburg School District did not expand to include the suburban property acquired by the City.

The State of Mississippi enforced these laws despite not gaining preclearance as required by the Voting Rights Act. In February 1990, the Appellees, individually as residents and registered voters of the City of Hattiesburg and in their official capacities as members of the school board of the Hattiesburg school district, filed this action under § 5 of the Voting Rights Act against the State of Mississippi. The

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in the present appeal filed a cross-appeal of this portion of the District Court's judgment in Dupree I. As the Appellants now concede, no issues related to the enforceability of the amendments to § 21-1-59 are before the Court. J.S. p. 9 n.7

Appellees sought declaratory and injunctive relief to halt enforcement of the laws.[2]

In its first opinion in this litigation, the District Court held that the repealer of § 37-7-611 had been properly submitted to and precleared by the Attorney General in 1986. Dupree vs. Mabus, 776 F. Supp. 290, 303 (S.D. Miss. 1991) (Dupree I), vacated and remanded sub. nom, Dupree vs. Moore, 117 L. Ed. 2d 609 (1992). The Court vacated Dupree I and remanded for reconsideration in light of Clark vs. Roemer, 500 U.S. ___, 114 L. Ed. 2d 691 (1991). On remand, the District Court held that, when measured against the principles outlined in Clark, the repealer of § 37-7-611 had not been precleared because the voting change effected by the repealer had not been specifically identified in the State's 1986 submission of other related voting changes. Dupree vs. Moore, 831 F. Supp. 1310, 1317 (S.D. Miss. 1993) (Dupree II).

The focus of this appeal--the status of the repealer of § 37-7-611--requires a review of the submission histories of the Uniform School Law and the repealer of § 37-7-611. In 1986, the Mississippi Legislature passed the Uniform School Law, a sweeping act designed to provide Mississippi with a common system of school administration. Section 47 of the Uniform School Law repealed § 37-7-611 and twenty-two other statutes that dealt with "the creation and operation of municipal separate school districts." J.S. App. 112a.

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[2] After the three-judge court convened, the Lamar County and Forrest County school districts and their school boards intervened as Defendants. In both districts, the board members are elected directly by the residents of the county school district. Miss. Code Ann. §§ 37-5-1, -3 (1990).

Section 52 of the Uniform School Law amended Miss. Code Ann. § 37-7-103. Prior to 1986, § 37-7-103 permitted a county board of education to abolish the boundaries of any school district in the county except a municipal school district. With the consent of the municipal school district, the county board of education could add to the municipal school district any part of the county adjoining the municipal school district or detach territory from the municipal school district and merge it into the county school system. Section 37-7-103 now provides that all school districts have the authority previously conferred on county boards of education. J.S. App. 113a-114a.

The State submitted the Uniform School Law to the Attorney General for preclearance on July 22, 1986. J.S. App. 69a. The submission consisted of a one-page cover letter, a thirteen-page document containing information arranged in accordance with the Department of Justice regulations governing § 5 submissions and a 467-page looseleaf booklet titled "Senate Bill 2117 - Comparison of Current Law and New Law," which contained the typed version of the bill interspersed with photocopied pages of the then-current statute amended by particular sections of the Uniform School Law. J.S. App. 84a-143a.[3]

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[3] The one-paragraph "Introductory Note" to the looseleaf booklet states that it provides "on a section by section basis each section of the current law which has been amended followed by each individual section of" the Uniform School Law. Thus, the State did not attempt to provide the Attorney General with a comparison of the prior law with the proposed law if the prior law was repealed. The Note also indicates that if a section of the Law creates "new law then only those particular sections will be denoted with no comparison of current law." The Note further stated that "[t]his section by

In 1986, § 51.25(a) of the regulations governing § 5 submissions to the Attorney General required that a copy of the enactment embodying the voting change be provided. J.S. App. 206a. In addition, § 51.25(b) stated that if the voting change was not "readily apparent on the face of the document provided under" § 51.25(a), the submission should contain "a clear statement of the change explaining the difference between the submitted change and the prior law or practice, or explanatory materials adequate to disclose to the Attorney General the difference between the prior and proposed situation with respect to voting." J.S. App. 206a. The regulations did not require the submitting jurisdiction to provide a copy of the prior law being repealed or amended.

The State characterized its submission as follows:

> This submission is cited as the "Mississippi Uniform School Law of 1986" and is submitted to the Attorney General of the United States in its entirety. . . . For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review. [J.S. App. 72a.]

The State then specifically identified thirteen of the 203 sections of the Uniform School Law. J.S. App. 72a-78a.

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section comparison provides explanatory materials adequate to disclose the difference between the prior and the proposed law." The Note concludes as follows: "By comparing each section of [the Uniform School Law] and the current practice, the changes to current law are easily identified." By the State's own admission, however, these comparisons were made only for statutes amended by the Law. J.S. App. 84a.

Section 47, which repealed § 37-7-611, was neither identified nor referred to anywhere in the thirteen-page submission. Section 47 does appear, without explanatory comment by the State, in a copy of the Uniform School Law supplied to the Attorney General and in the looseleaf booklet. Section 52, which amended § 37-7-103, was one of the thirteen sections specifically identified and discussed in the submission. J.S. App. 74a.

The discussion of § 52 in the State's submission consisted of a paraphrase of the then-current statute and the amended version but made no mention of § 47 or § 37-7-611. The analysis of § 52 did not refer in any way to the State's longstanding policy, reflected in § 37-7-611, of automatically extending a city school district's boundaries after an annexation by its parent city. The State did not suggest that § 52 was designed to replace this policy.

The Attorney General responded to the State's submission on August 29, 1986. He did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." J.S. App. 147a (emphasis added). The voting change effected by the repeal of § 37-7-611 was not specifically identified in the submission and was not precleared. The State acknowledged that the status of § 37-7-611 remained unclear after the Attorney General's response, J.S. App. 173a, and conceded in the District Court that its July 1986 submission contributed to the uncertainty. Memorandum in Support of State Defendants' Motion to Dismiss, p. 8.

In formal recognition of the absence of preclearance, the State submitted § 47 to the Attorney General on December 30, 1987. J.S. App. 149a. In its submission of § 47, the State acknowledged that the entire Uniform School Law was

not precleared by the Attorney General. See, e.g. J.S. App. 152a ("The major part of [the Uniform School Law], as it deals with the Voting Rights Act . . . has already been precleared.") (emphasis added); J.S. App. 155a ("[M]ost of" the Uniform School Law has "already been precleared by the United States Justice Department.") (emphasis added); J.S. App. 155a ("[S]ubstantive parts of" the Uniform School Law were "precleared by the Justice Department on August 29, 1986.") (emphasis added).

On January 27, 1989, the State responded to the Attorney General's request for additional information concerning the repeal of § 37-7-611. The State again acknowledged that the Uniform School Law had not been precleared in its entirety in 1986. Moreover, the State expressly represented that § 47 had not been specifically identified in the earlier submission of the Uniform School Law.

> On July 22, 1986, the State of Mississippi submitted [the Uniform School Law] for preclearance under Section 5 of the Voting Rights Act. . . . On August 29, 1986, [the Uniform School Law] was precleared under Section 5 as to the particular sections identified in our July 22, 1986 submission.
>
> On December 30, 1987, the State of Mississippi submitted [the repealer of § 37-7-611] since [it] was not specifically identified in our original submission. [Lamar J.S. App. 3 (emphasis added).]

The Attorney General interposed an objection to the repeal of § 37-7-611 on March 31, 1989.[4]

On January 12, 1990, the State sought reconsideration of the Attorney General's limited preclearance of the Uniform School Law or, alternatively, the objection interposed to the repeal of § 37-7-611. J.S. App. 169a. The State contended for the first time that the entire Uniform School Law had been submitted and precleared in 1986. J.S. App. 170a-174a. On May 25, 1990, the Attorney General rejected the State's position.

> At the outset, we note that the state makes several claims about the preclearance status of the instant changes which appear to seriously misconstrue the structure, purpose, and history of the preclearance requirement. . . .
>
> Section 5, as interpreted by the courts and our submission guidelines, plainly fixes the responsibility for identifying voting changes on the state, not the United States Attorney General, yet the state appears to be arguing in

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[4] The Attorney General concluded the repeal of § 37-7-611 would likely "create a class of city voters (for the most part predominantly white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." The State did not provide a rationale for the creation "of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently than white voters." J.S. App. 167a.

> both instances that the Attorney General should have uncovered voting changes of which the state itself seemingly was unaware at the time the prior submissions were made. [J.S. App. 200a-201a.]

In Dupree I, the District Court concluded the 1986 repealer of § 37-7-611 had been adequately identified in the State's submission of the Uniform School Law and, therefore, precleared by the Attorney General when he did not interpose an objection within 60 days. The Appellees in this appeal filed an appeal of that portion of the District Court's judgment in Dupree I. The Court vacated and remanded Dupree I in light of its decision in Clark vs. Roemer, which emphasized a state's obligation to identify with specificity the voting change for which it seeks preclearance. On remand, the District Court ruled in Dupree II that

> Mississippi's 1986 submission is precisely that circumstance condemned by Clark v. Roemer. Should this court permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle, as Mississippi has done here, this court would be ignoring Clark's clear pronouncement that a State must "identify with specificity each change that it wishes the Attorney General to consider" in a § 5 submission.

J.S. App. 20a. As a result, the District Court held the repealer of § 37-7-611 to be ineffective and unenforceable

until Mississippi obtains administrative or judicial preclearance. J.S. App. 20a-21a.[5]

ARGUMENT

A. The appeal should be dismissed because the Appellants filed their notice of appeal before the District court decided the Appellants' Rule 59 motion.

After the District Court entered its Memorandum Opinion and Order in Dupree II on August 30, 1993, the Appellees submitted a proposed final judgment to that Court. Prior to entry of a final judgment, the Appellants on September 13 served a joint motion pursuant to Fed. R. Civ. P. 59 to alter or amend the August 30 order or, in the alternative, for a new trial. Motion App. 1a.[6] On September 24, while the Rule 59 motion was pending, the Appellants filed a "notice of interlocutory appeal." J.S. App. 36a. In an October 29 order, the District Court announced it would withhold ruling on the Appellants' Rule 59 motion because the

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[5] The Lamar Appellants' contention, Lamar J.S. 11-12, that the District Court failed to issue a remedy is baseless. Dupree II enjoins the enforecement of the repealer of § 37-7-611 until the State complies with the Voting Rights Act. J.S. App. 20a-21a. This remedy is consistent with Clark vs. Roemer: "If voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." 114 L. Ed. 2d at 701.

[6] The Appellants also filed joint motions for a remedy and for a stay pending appeal. The District Court reserved ruling on the former and denied the latter. Lamar J.S. App. 2.

relief sought in the motion "would intrude needlessly upon the proceedings" before the Supreme Court. Lamar J.S. App. 2.

The jurisdictional question presented is whether the Appellants' Rule 59 motion suspended the finality of the August 30 order. As noted, the District Court has not yet acted on the Rule 59 motion because of the present appeal. The Court has held that a motion to alter or amend or for a new trial suspends the finality of the original judgment and renders ineffective a notice of appeal filed prior to resolution of the pending motion. As a result, this appeal should be dismissed.

The Court has consistently treated petitions for rehearing or motions to alter a lower court's judgment as suspending the time in which a petition for certiorari or a notice of appeal must be filed. "This proposition applies to all cases, civil and criminal, that arise from either federal or state courts . . . [and] also applies to motions for reconsideration of judgments of federal district courts directly appealable to the Supreme Court." Robert L. Stern et al., Supreme Court Practice § 6.3, at 285 (7th ed. 1993).[7]

In FCC vs. League of Women Voters, 468 U.S. 364 (1984), the Court noted that "the filing of a . . . motion to amend or alter the judgment 'suspend[s] the finality of the [original] judgment,' thereby extending the time for filing a

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[7] This proposition is expressly stated in the Court's Rules governing certiorari (Rule 13.4) but is omitted from the Rule governing appeals (Rule 18). Former Rule 11.3, which concerned appeals, contained this proposition. Thus, although the "matter is not free from doubt . . . , [i]t is most unlikely that the Court intended, sub silentio, to abandon this 'well-established rule.'" Stern, supra, § 7.3,at 388.

notice of appeal 'until [the lower court's] denial of the motion . . . restores' that finality." Id. at 373 n.10 (quoting Communist Party vs. Whitcomb, 414 U.S. 441, 445 (1974) (direct appeal from three-judge court)); accord Washington vs. Confederated Tribes, 447 U.S. 134, 149 & n.24 (1980) (direct appeal from three-judge court) (motion for partial new trial rendered nonfinal all issues decided by that court); 12 James Wm. Moore et al., Moore's Federal Practice ¶ 607.04[12], at 9-29 (1993).

As seen by their notice of interlocutory appeal, the Appellants contend the District Court's August 30 order is not a final order. Assuming, without conceding, that they are correct, the appeal should still be dismissed.

> In this context, finality relates not to the final or interlocutory nature of the judgment on the merits but to the finality of the action being taken by the lower court. If a rehearing is sought in the court below, there is no absolute certainty that the judgment below will not be altered. Only when there is such certainty can the judgment properly be made the subject of [an appeal]. And thus it is that the time for [filing an appeal] commences on the date when certainty and finality attach to the action taken by the lower court. Where rehearing has been sought, that date is the one on which rehearing was denied.

Stern, supra, § 6.3, at 285.

The Court in League of Women Voters also pointed out that "the rule requiring suspension of a judgment's finality for purposes of appeal during the pendency of a postjudgment

motion for reconsideration applies only when such a motion actually seeks an 'alteration of the rights adjudicated' in the court's first judgment." 468 U.S. at 373 n.10 (quoting Department of Banking vs. Pink, 317 U.S. 264, 266 (1942) (per curiam)). In this appeal, the Appellants' Rule 59 motion seeks substantive changes in the District Court's August 30 order, Motion App. 1a, and is not directed to collateral matters. See League of Women Voters, 468 U.S. at 364 n.10 (post-judgment motion regarding "wholly collateral" issue of attorneys' fees held not to suspend finality of district court's original judgment).

This appeal should be dismissed.

B. The question is not substantial because the District Court's interpretation of the preclearance requirements of § 5 of the Voting Rights Act is consistent with decisions of the Court and the objectives of the Act.

The District Court's decision in Dupree II is a straightforward application of Clark vs. Roemer. The District Court's holding that the State failed to identify with specificity the voting change for which it sought preclearance does not depart from the Court's precedent or create a conflict with a decision from another circuit. The decision does not pose problems for the preclearance process because the Justice Department's position prevailed in the District Court. The Appellees respectfully submit that the District Court's decision in Dupree II is so obviously correct that it should be summarily affirmed.

The argument advanced by the Appellants and the dissenting judge in Dupree II would significantly reduce the responsibility of jurisdictions covered by the Voting Rights Act to identify clearly the voting changes submitted to the

Attorney General for preclearance. The diminution of that burden on submitting jurisdictions would create administrative problems for the Attorney General. In addition, the view advanced by the Appellants and the dissent below "would diminish covered jurisdictions' responsibilities for self-monitoring under § 5 and would create incentives for them to forgo the submission process altogether." Clark vs. Roemer, 114 L. Ed 2d at 704-05. Ultimately, the purpose envisioned by Congress for administrative preclearance -- providing states with an expeditious method of having nondiscriminatory voting laws implemented without undue delay -- would be disserved.

Since Allen vs. State Board of Elections, 393 U.S. 544 (1969), the Court has interpreted the Voting Rights Act to require that a state submit its voting changes to the Attorney General in an "unambiguous and recordable manner." Id. at 571; see United States vs. Board of Comm'rs, 435 U.S. 110, 136 (1978) ("the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him"). The regulations governing § 5 submissions have always contained a similar requirement. City of Rome vs. United States, 446 U.S. 156, 169 n.6 (1980).

In McCain vs. Lybrand, 465 U.S. 236 (1984), the Court provided extensive direction on this issue, and the principles articulated in that decision were reaffirmed in Clark vs. Roemer.

> We made clear [in McCain] that the submission of legislation for administrative preclearance under § 5 defines the scope of the preclearance request. Under normal circumstances, a

> submission pertains only to identified changes in that legislation. We established also that any ambiguity in the scope of a preclearance request must be resolved against the submitting authority.

114 L. Ed. 2d at 703 (citations omitted). In reversing the district court's holding that the Attorney General's preclearance of certain identified voting changes constituted preclearance of other related but unidentified voting changes, the Court in Clark reiterated the importance of specificity in the state's submission: The state "must identify with specificity each change that it wishes the Attorney General to consider." Id. at 704. The Court also reaffirmed the presumption established in McCain that the Attorney General will review only the voting changes specifically described in the state's submission. Id.

In light of Clark, the District Court in Dupree II was correct in holding that the State did not properly submit the repealer of § 37-7-611 to the Attorney General in 1986 when it submitted other related voting changes. The submission of the Uniform School Law in 1986 did not contain an explanation of the process by which municipal school district boundaries automatically expand to encompass territory in an adjacent school district after an annexation by its parent municipality. Nor did the 1986 submission indicate that this process was repealed by § 47 of the Uniform School Law. Moreover, the submission is utterly silent about any voting change effected by the repeal of § 37-7-611.

The Appellants contend the discussion of § 37-7-103 in § 52 of the State's submission put the Attorney General on notice that this statute was designed to replace the automatic extension policy of § 37-7-611 and serve as the sole method

of altering school district boundaries. The State, however, did not describe the amendment of § 37-7-103 in this manner in the submission. The discussion of amended § 37-7-103 simply reveals that any school district could voluntarily agree with any other school district to a revision of the boundaries of the districts. J.S. App. 74a. Thus, the Appellants' position is contrary to Clark: "A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices." 114 L. Ed. 2d at 704 (quoting McCain).[8]

The Appellants also point to the statements that the Uniform School Law was submitted "in its entirety" and that "the complete act is submitted for review." The use of these phrases, they argue, made the submission unambiguous. These phases do not identify any voting change, much less

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[8] The Appellants emphasize the Mississippi Supreme Court's decision in Greenville Public School Dist. vs. Western Line Public School Dist., 575 So. 2d 956 (Miss. 1990), cert. denied, 117 L. Ed. 2d 649 (1991), which held that, even if the repealer of § 37-7-611 was not precleared, the amendment to § 37-7-103 repealed § 37-7-611 by implication under state rules of statutory construction. The Appellants contend the District Court in Dupree II should have deferred to the state supreme court's holding, Lamar J.S. pp. 15-17, or "recognized that § 37-7-103 must supersede § 37-7-611," J.S. p. 23 n.9. This issue is insubstantial because the District Court correctly held in Dupree II that "even if Section 52 in effect amounted to a repeal of § 37-7-611 by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 18a-19a & n.10.

suggest that the State intended § 37-7-103 to replace § 37-7-611. As the Solicitor General noted in the appeal of Dupree I, it is doubtful the State "intended to submit the Uniform School Law 'in its entirety,' since most of its 203 sections have nothing to do with voting." Br. p. 17 n.13. A clear statement that voluminous legislation is submitted "in its entirety" does not satisfy Clark's requirement that a state clearly identify each voting change in its submission.

The Appellants contend that the bare citation in the looseleaf booklet of § 37-7-611 and twenty-two other statutes dealing with the creation and operation of municipal school districts suffices for a proper submission of the voting change effected by the repeal of § 37-7-611. In other words, the Appellants suggest that although the State did not identify or explain the automatic extension policy in § 47 or elsewhere in the submission, the Attorney General should have understood that the State intended to change this policy by including § 37-7-611 in a list of repealed statutes in § 47. Their argument is plausible only if the Attorney General was duty bound to retrieve, review and study the more than 100 statutes, including § 37-7-611, listed, without elaboration, as having been repealed in the 1986 submission of the Uniform School Law.

The Court in Clark vs. Roemer expressly rejected the view of § 5 pressed by the Appellants and the dissent below. A state's obligation to identify with specificity each voting change is not a favor bestowed on the Attorney General. Noting the thousands of voting changes reviewed annually by the Attorney General, Clark requires that before a state's voting change can be enforced, the state must "identify, submit, and receive approval for" the change. 114 L. Ed. 2d at 704. Requiring the Attorney General to conduct independent research to determine whether a submission

contained unidentified voting changes "would add to the Attorney General's already redoubtable obligations." Id.

Today, virtually all voting changes are submitted by covered jurisdictions to the Attorney General for preclearance because of the cost and time constraints in litigating in the District of Columbia District Court. By allowing for administrative preclearance, however, "Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency." McCain, 465 U.S. at 246. Under either method of preclearance, the covered jurisdiction bears the burden of proving that the change in voting does not have a discriminatory purpose or effect, and in both instances "federal officials are confronted with the same 'difficult substantive issue.'" Id. at 247 (quoting Allen, 393 U.S. at 558). In the light of the emphasis on administrative preclearance, Clark notes the "requirement that the State identify each change is necessary if the Attorney General is to perform his preclearance duties under § 5." 114 L. Ed. 2d at 704.

The Appellants' position would permit a state to claim that the submission of an act is complete and unambiguous, even without specifically identifying each voting change sought to be reviewed, as long as the State includes the catch-all phrase "the complete act is submitted for review." In response, the Attorney General would likely interpose an objection rather than risk approving a discriminatory voting change not identified in the submission but otherwise a part of the "complete act" submitted for review. This response, however, might well delay "the implementation of validly enacted, nondiscriminatory state legislation," a primary objective of administrative preclearance. See Morris vs.

Gressette, 432 U.S. 491, 503 (1977).[9] Although such a response by the Attorney General would be the most prudent exercise of his responsibilities, it "would only add acrimony to the administration of § 5." Georgia vs. United States, 411 U.S. 526, 540-41 (1973). In the context of judicial preclearance, a covered jurisdiction could hardly argue that the District of Columbia District Court approved a voting change that was not identified in the complaint or litigated at trial. To hold a state to a less demanding standard in seeking administrative preclearance would render the declaratory judgment route superfluous. Cf. id. at 538 ("Any less stringent standard [for the burden of proof] might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered States a far smoother path to clearance.").

The Appellants also base an argument on the regulation (§ 51.35) in effect in 1986 that required the Attorney General to request additional information if he considered the State's July 1986 submission to be incomplete. J.S. App. 208a. This position is wrong for two reasons. First, the Appellants presume the Attorney General considered the State's submission to present the entire Uniform School Law for approval. Rather, it is clear the Attorney General considered only the thirteen specifically identified voting changes to be before him for review. The August 29, 1986 letter confirmed this view of the submission: "The Attorney General does not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in your July 22,

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[9] The Appellants' reliance on Morris is misplaced because the issue presented in this appeal--whether a voting change was properly submitted to, and evaluated by, the Attorney General--was not present in Morris. The submission in Morris was unambiguous. 432 U.S. at 502, 504 & n.19.

1986, letter." J.S. App. 147a. As to the thirteen specifically identified voting changes, the State's submission was complete. Thus, the Attorney General had no reason to request additional information regarding those changes.

Second, the Appellants' reliance on the lack of a request reflects a flawed perception of the purpose of the regulation, which allows the 60-day period for action to be suspended by a request for additional information. "The judgment that the Attorney General must make is a difficult and complex one, and no one would argue that it should be made without adequate information." Georgia vs. United States, 411 U.S. at 540. The regulation enables the Attorney General to make an informed decision by requesting additional information relevant to the changes identified in the initial submission. The regulation is not a mechanism for the Attorney General to ferret out other potential voting changes a state neglects to identify. A state knows better than anyone what it wishes precleared and the burden of uncovering voting changes in a submission should not be, as the Appellants suggest, the responsibility of the Attorney General.

In summary, Dupree II correctly applied Clark vs. Roemer and prohibited the State from enforcing the repealer of § 37-7-611 until the State receives either administrative or judicial preclearance. In response to the potential for discrimination in the electoral scheme caused by the repeal of § 37-7-611 the Attorney General interposed an objection when the repealer was specifically identified in a submission by the State of Mississippi. Dupree I nevertheless declared the Attorney General's objection invalid. On remand from the Court, Dupree II upheld the Attorney General's objection because the State did not specifically identify the voting change effected by the repealer in the 1986 submission of the

Uniform School Law. The District Court's decision is correct and further argument is unnecessary.[10]

CONCLUSION

For these reasons, the appeal should be dismissed or the District Court's decision should be affirmed.

RESPECTFULLY SUBMITTED,

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December 23, 1993

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[10] The Lamar Appellants raise several questions concerning standing and the proper scope and application of § 5. Lamar J.S. pp. 9-15, 17-18. These questions are insubstantial because Dupree I correctly held that the Appellees had standing and that § 5 applies to the repealer of § 37-7-611. No appeal was taken from these portions of the judgment in Dupree I. Moreover, Clark vs. Roemer clearly explained the duties of a covered jurisdiction under § 5.

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
HATTIESBURG DIVISION

JOHNNY DUPREE, JEFF R. BOWMAN, KATHRYN JONES AND CHARLOTTE TULLOS, Individually and in Their Official Capacities as Members of the Board of Trustees of the Hattiesburg Public School District — **PLAINTIFFS**

VS. — **CIVIL ACTION, NO. H90-0043(W)**

MIKE MOORE, Attorney General of Mississippi, in His Official Capacity, and the STATE OF MISSISSIPPI — **DEFENDANTS**

and

THE LAMAR COUNTY BOARD OF EDUCATION and TRUSTEES, in Their Official Capacities, Charles L. Camerson, Rita Downs, Tommy Graham, Freddie G. Howell and Dr. Johnny R. Purvis — **DEFENDANTS/INTERVENORS**

and

FORREST COUNTY SCHOOL DISTRICT and the Members of the BOARD OF TRUSTEES Thereof in Their Official Capacities — **DEFENDANTS/INTERVENORS**

JOINT MOTION FOR NEW TRIAL, OR TO ALTER OR AMEND ORDER

COME NOW the Defendants Mike Moore, Attorney General of Mississippi, in His Official Capacity and the State of Mississippi, Defendant/Intervenors The Lamar County Board of Education and Trustees, in Their Official Capacities, and Defendants/Intervenors Forrest County School District and Trustees, by and through their attorneys of record, and make this their Joint Motion for a New Trial pursuant to Rule 59(a) or Motion to Alter or Amend Order pursuant to Rule 59(e), on the grounds as follows:

1. The Court may open its Order if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions and direct the entry of a new judgment to address:

(1) The appropriate remedy, and the practical implications, given the holding that the repealer of Section 37-7-611 has not been precleared under Section 5 of the Voting Rights Act of 1964, when Section 52 of the Uniform School Law, codified as Section 37-7-103, Miss. Code Ann. (Supp. 1987), was held precleared.

(2) Whether under precedent, including Dotson v. City of Indianola, 514 F.Supp. 397 (N.D. Miss. 1981), aff'd, 455 U.S. 936 (1982), 739 F.2d 1022 (5th Cir. 1984), the appropriate remedy under Section 5 of the Voting Rights Act of 1964 is limited to a voting remedy, i.e., the school districts' boundaries remain where they are and have been, but the persons annexed may not change their manner of voting. That is, the school districts would remain where they are, but the citizens annexed in Lamar and Forrest counties would not be allowed to vote for the County School Boards.

(3) The propriety of enforcing state law as it pre-existed under 37-7-611 (unchanged since 1926 if the 1986 changes are deemed not precleared) considering the impact of Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) precluding federal enforcement of state statutes.

(4) The failure of preclearing the 1966 Hattiesburg annexation creates a gap of contiguous annexation in violation of state law.

(5) The three-judge court found that "The state's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (P. 19 of the Memorandum Opinion and Order on Remand from the Supreme Court of the United States, as issued August 27, 1993). This finding again raises the question of the affect of 28 C.F.R. Sections 51.25 and 51.35 (1986) which were in effect at the time.

(6) Although the three-judge court rejected the notion of repeal by implication, there remain questions of Mississippi statutory construction concerning the impact of precleared Section 37-7-103 over pre-existing 37-7-611, with the operation of state law.

(7) There then arise by necessity the issues concerning enforcement of the Mississippi Supreme court decision in Greenville Public School District, et al. v. Western Line Consolidated School District, 575 So.2d 956 (Miss. 1990).

(8) Other issues as to standing of parties and ripeness of the issues are raised again in terms of whether, if boundary lines are changed for the Lamar County and Forrest County School Districts, those districts must move to intervene in "United States of America and Zandra Pittman, et al. v. The State of Mississippi, et al. and Hattiesburg Public School District", Civil Action, No. 4706 and/or whether Hattiesburg must join Lamar County as a necessary party under Rule 19.

Respectfully submitted,
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